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Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980
No. _____

ISHVARBHAI J. PATEL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Ishvarbhai J. Patel, your petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cause on April 4, 1980.

QUESTION PRESENTED

Petitioner was one of five defendants[1/] jointly tried for immigration crimes in the United States District Court for the Central District of California. The trial court granted motions to dismiss the indictment and for judgment of acquittal on all counts. The question presented is:

1. Whether the Double Jeopardy Clause bars the prosecution's appeal from the judgment of acquittal entered by the trial court.

1/ The other four defendants are Jose Luiz Gonzales, Oscar Celso Orosco-Morales, Hector Garcia-Martinez, and Samuel Gudino-Barajas.

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OPINIONS BELOW

Petitioner and his four co-defendants were jointly tried in the United States District Court for the Central District of California. On May 11, 1978, the District Court filed its Judgment of Acquittal and Dismissal (Appendix B hereto).

The prosecution appealed to the United States Court of Appeals for the Ninth Circuit, which entered judgment on April 4, 1980. The opinion is reported at 617 F.2d 1358 (9 Cir., 1980). A complete copy of the opinion and judgment is attached as Appendix A hereto.

On July 27, 1980, the Court of Appeals denied a petition for rehearing and rejected the suggestion for a rehearing en banc. A copy of the order is attched as Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 4, 1980. A timely petition for rehearing, with suggestion of appropriateness of rehearing en banc, was denied on June 27, 1980, and this petition for certiorari was filed within 30 days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the Constitution of the United States:

> "***[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb;..."

Title 18, United States Code

(Criminal Appeals Act)

> "§ 3731. Appeal by the United States
>
> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> * * *"

STATEMENT OF THE CASE

Petitioner and his four co-defendants were jointly tried in the United States District Court for the Central District of California after being indicted by the Federal Grand Jury for the Central District of California and charged with various violations of the criminal statutes of the United States. The trial by jury began on May 5, 1978, with the Honorable A. Andrew Hauk presiding.

On the fourth day of trial, the court was informed by the prosecution that two witnesses had been released by the Immigration and Naturalization Service without first having been made available to defense counsel. Defense counsel moved to dismiss the indictment on the grounds that the defendants' constitutional

rights to due process of law and compulsory process had been violated. After conducting a full day's hearing, the trial court initially stated that it was prepared to order a judgment of acquittal. The prosecution objected that the appropriate remedy was dismissal, citing Rule 29, F.R.Cr.P. After reconsidering its position, the trial court announced that it had been persuaded by the prosecution's argument, and ordered the indictment dismissed.

Immediately thereafter, the prosecutor began to argue that "the interests of justice" had not been served, since "Your Honor, there has been no finding of guilt or innocence in the case." In response to the prosecutor's insistence that "society" deserved a determination of innocence or guilt, the court suggested that it would make such a deter-

mination if desired. Following a motion by the defense, a judgment of acquittal was ordered by the trial court.

The government appealed to the United States Court of Appeals for the Ninth Circuit. The cause was argued on October 2, 1979. A per curiam opinion rejecting the defendants' contention that the appeal was barred by the Double Jeopardy Clause of the Fifth Amendment was entered on April 4, 1980; it stated that "[T]he record does not plainly demonstrate that the district court evaluated the government's evidence and determined that it was legally insufficient to sustain a conviction" (See Appendix A). On June 27, 1980, the petition for rehearing of this petitioner was denied by the Court of Appeals (See Appendix C).

REASONS FOR GRANTING THE WRIT

1. THE OPINION SETS UP A STANDARD OF REVIEW WHICH CONSTITUTES A RADICAL DEPARTURE FROM ESTABLISHED PRINCIPLES OF CONSTITUTIONAL LAW

Citing United States v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978) and F.R.Cr.P. Rule 29, the opinion in essence sets out, as the standard of review for the district court's judgment of acquittal, whether "the record... plainly demonstrate[s] that the district court evaluated the government's evidence and determined that it was legally insufficient to sustain a conviction" (App. A-11).

As authority for employing this standard of review, the opinion cites a passage in United States v. Scott, 437 U.S. 82, 97, 98 S.Ct. 2187 (1978), to the effect that a defendant is acquitted

only when the judge's ruling, whatever its label, actually represents a resolution of some or all factual elements of the offense charged, and that an appeal is barred only where it is plain that the district court evaluated the government's evidence and determined it was legally insufficient to sustain a conviction.

However, Scott did not purport to decide under what circumstances a judgment of acquittal might be treated as appealable, since no judgment of acquittal was requested or granted in Scott. Scott instead determined that a dismissal for pre-indictment delay granted after jeopardy had attached did not bar a prosecution appeal, since (under the holding in Scott) a defendant's decision to move for dismissal of an indictment after jeopardy attached constituted an

election to forego the protection of the Double Jeopardy Clause insofar as it would otherwise preclude appellate review of the dismissal.

The language in Scott which is the source for the standard of review employed here is itself simply a reference to language in the Supreme Court's earlier decision in United States v. Martin Linen Supply Co., 430 U.S. 564, 571-572, 97 S.Ct. 1349, 1354-1355 (1977). Martin Linen Supply did not involve a judgment of acquittal. But instead of supporting the standard of review employed here, Martin Linen Supply is strong support for petitioner's position that the Double Jeopardy Clause bars the prosecution's appeal from the judgment of acquittal here. Martin Linen Supply specifically rejects the notion that Rule 29 limits the power of a trial

judge to grant a judgment of acquittal, however erroneous the acquittal might be:

> "Such a limitation on the role of a trial judge, however, has never inhibited his ruling in favor of a criminal defendant. Fong Foo v. United States, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962), establishing the binding nature of a directed verdict, is despositive on that point. Since Rule 29 merely replaces the directed-verdict mechanism employed in Fong Foo, and accords the federal trial judge greater flexibility in timing his judgment of acquittal, no persuasive basis exists for construing the Rule as weakening the trial court's binding authority for purposes of double jeopardy [Footnote omitted]." 430 U.S. 573, 97 S.Ct. 1355.

2. WHERE A TRIAL COURT INTENDED TO ADJUDICATE GUILT OR INNOCENCE, RATHER THAN TO DECIDE ISSUES OF LAW UNRELATED TO GUILT OR INNOCENCE, AN APPEAL IS BARRED BY THE DOUBLE JEOPARDY CLAUSE

The judgment of acquittal here was clearly intended to constitute a separate adjudication of guilt or innocence, rather than addressing the issues of

constitutional law which the trial court had already decided. The prosecutor specifically invited the trial court to take appropriate steps to achieve a determination of guilt or innocence, notwithstanding the trial court's already announced decision to dismiss the indictment. Taking up the prosecutor's invitation, the trial court responded by making the "finding of guilt or innocence" invited by the prosecutor.

Although the opinion concludes that "...the order was based on constitutional grounds arising from the unavailability of potential material witnesses", the judgment of acquittal clearly was intended to adjudicate guilt or innocence, rather than to be merely a label attached to a determination of issues of law unrelated to guilt or innocence. It is for this reason that the standard of

review employed here represents such a radical departure from established principles of constitutional law which go to what the opinion itself describes as "the most fundamental rule in the history of double jeopardy jurisprudence...[i.e.] that a judgment of acquittal may not be appealed by the government without putting a defendant twice in jeopardy" (App. A-8).

Surely the opinion does not mean that appellate review of a jury's verdict of acquittal would be permissible, simply because the record in the trial court did not plainly demonstrate that the acquittal had resulted from a determination that the government's evidence was legally insufficient to sustain a conviction. The Double Jeopardy Clause is unquestionably intended to protect the jury's determination of innocence from

any such review. Martin Linen Supply makes it clear that where a trial judge's judgment of acquittal was intended to adjudicate guilt or innocence, it is just as free from appellate review as a jury verdict of acquittal.

In essence, the opinion implicitly holds that it was appealable error for the trial court to grant a judgment of acquittal prior to the close of the government's case-in-chief, and that the judgment of acquittal was beyond the trial court's jurisdiction to order prior to the government finally resting its case. However, in Fong Foo v. United States, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962) (per curiam), the error in the trial court for which the prosecution sought appellate review was precisely the same--the granting of a judgment of acquittal prior to the close

of the prosecution's case-in-chief. See In re United States, 286 F.2d 556 (1 Cir., 1961) (reversed in Fong Foo). Indeed, the First Circuit had specifically held the judgment of acquittal in Fong Foo to be beyond the trial court's jurisdiction to order, thus void, and not a basis for the protection of the Double Jeopardy Clause. 286 F.2d 564-565. It was this determination which the Supreme Court specifically repudiated in Fong Foo, even where an appellate court had concluded that "the acquittal was based upon an egregiously erroneous foundation". Fong Foo v. United States, 369 U.S. 141, 143, 82 S.Ct. 671, 672.

In Sanabria v. United States, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978), the Supreme Court specifically reaffirmed its holding in Fong Foo that the Double Jeopardy Clause bars any appeal from a

judgment of acquittal:

> "In deciding whether a second trial is permissible here, we must immediately confront the fact that petitioner was acquitted on the indictment. That '"[a] verdict of acquittal...[may] not be reviewed...without putting [the defendant] twice in jeopardy, and thereby violating the Constitution,"' has recently been described as 'the most fundamental rule in the history of doubly jeopardy jurisprudence.' United States v. Martin Linen Supply Co., 430 U.S. 564, 571, 97 S.Ct. 1349, 1354, 51 L.Ed.2d 642 (1977), quoting United States v. Ball, 163 U.S. 662, 671, 16 S.Ct. 1192, 1195, 41 L.Ed. 300 (1896). The fundamental nature of this rule is manifested by its explicit extension to situations where an acquittal is 'based upon an egregiously erroneous foundation.' Fong Foo v. United States, 369 U.S. 141, 143, 82 S.Ct. 671, 672, 7 L.Ed.2d 629 (1962); see Green V. United States, 355 U.S. 184, 188, 78 S.Ct. 221, 223, 2 L.Ed2d 199 (1957)." 98 S.Ct. 2178.
>
> * * *
>
> "The Government's real quarrel is with the judgment of acquittal. While the numbers evidence was erroneously excluded, the judgment of actuittal produced thereby is final and unreviewable. Neither

18 U.S.C. § 3731 nor the Double Jeopardy Clause permit the Government to obtain relief from all of the adverse rulings--most of which result from defense motions--that lead to the termination of a criminal trial in the defendant's favor. See United States v. Wilson, supra, 420 U.S., at 351-352, 95 S.Ct. at 1025-1026; S.Rep. No. 91-1296, p. 2 (1970). To hold that a defendant waives his double jeopardy protection whenever a trial court error in his favor on a midtrial motion leads to an acquittal would undercut the adversarial assumption on which our system of criminal justice rests, see Jeffers v. United States, supra, 432 U.S., at 159-160, 97 S.Ct. at 2209 (STEVENS, J., dissenting in part and concurring in the judgment in part), and would vitiate one of the fundamental rights established by the Fifth Amendment.

"The trial court's rulings here led to an erroneous resolution in the defendant's favor on the merits of the charge. As Fong Foo v. United States, supra, makes clear, the Double Jeopardy Clause absolutely bars a second trial in such circumstances. The Court of Appeals thus lacks jurisdiction of the Government's appeal." [Emphasis added].
98 S.Ct. 2186.

In short, the standard of review and the result reached in the opinion are clearly contrary to the holdings in Fong Foo and Martin Linen Supply. The district court's judgment of acquittal was clearly intended to address guilt or innocence, rather than issues of law unrelated to guilt or innocence. The Double Jeopardy Clause therefore bars this appeal. Compare United States v. Appawoo, 553 F.2d 1242 (10 Cir., 1977) with United States v. Fay, 553 F.2d 1247 (10 Cir., 1977).

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellant,	)	NO. 78-2339
	)	
vs.	)	
	)	
JOSE LUIS GONZALES, et al.,	)	
	)	
Defendants-Appellees.	)	OPINION
	)	

[April 4, 1980]

Appeal from the United States
District Court for the Central
District of California
Andrew A. Hauk, District Judge,
Presiding
Argued and submitted October 2, 1979

Before: GOODWIN and SNEED, Circuit Judges, and JAMESON,* District Judge

---

* The Honorable William J. Jameson, Senior United States District Court Judge for the District of Montana, sitting by designation.

PER CURIAM

The government appeals from a district court judgment of acquittal and the dismissal of an indictment which charged the defendants with eight counts of violating the immigration laws of the United States. We reject appellee's contention that the government's appeal is barred by the double jeopardy clause of the Fifth Amendment and remand the case for further proceedings.

I.

Factual Background

On March 31, 1978, nine individuals were indicted for violating the immigration laws of the United States. Count One of the Indictment charged all defendants with conspiracy to transport illegal aliens across the Mexican border into southern Arizona and thence to Los Angeles. Counts Two through Eight

charged individual defendants with separate acts of harboring or transporting illegal aliens, and with aiding and abetting these offenses.

On April 4, 1978, the district court designated as material witnesses twelve illegal aliens who had been arrested with certain defendants and ordered them held on $5,000 corporate surety bonds. Three other illegal aliens had already been designated as material witnesses by a magistrate and ordered held on similar bonds. The trial judge ordered all counsel to interview the material witnesses by April 10, 1978, and to file statements with the court concerning retention of the material witnesses for trial. Statements were filed by all parties and all material witnesses were requested held for trial.

Before trial, motions to dismiss the

indictment were made on the grounds that defendants had been deprived of their constitutional rights to compulsory process and due process by the failure of the government to retain other aliens as material witnesses, particularly the government's alleged failure to retain one individual whom the government had agreed to hold. After a three day hearing, the motions were denied on the basis that there had been no governmental misconduct and the production by the government of the witness in court before trial had rendered the motions moot.

The jury was then empaneled and the trial commenced. For three days the government presented the testimony of seven witnesses. On the fourth day of trial, the government informed the court that it had learned that two other illegal aliens, who had been arrested with

the defendants, had not been made available to defense counsel, and had been released by the government through agents of the Immigration and Naturalization Service. One had been allowed to return voluntarily to Mexico in lieu of deportation and the other had been released in Los Angeles.

The trial was suspended and a hearing was held. The government produced one of the "missing" witnesses at that hearing. The defendants moved to dismiss the indictment on the basis of United States v. Mendez-Rodriguez, 450 F.2d 1 (9th Cir. 1971) and United States v. Tsutagawa, 500 F.2d 420 (9th Cir. 1974). The court granted the motion, and suggested that defendants also move, which they promptly did, for a judgment of aquittal. The order was stayed for two days at the government's request. The following day

the government moved to vacate the dismissal order on the ground that it could produce the other witness. On the same day the district court filed its written judgment of acquittal and dismissal.

The next day the district court heard and denied the government's motion to vacate. The government had produced both witnesses and contended that their presence rendered moot the Mendez-Rodriguez issue. Immediately after the denial of the motion to vacate, the government filed an emergency petition for a writ of mandamus in this court. The petition was denied, but the dismissal was stayed for four days. At the expiration of that period, the district court lifted the stay, entered the judgment of acquittal and dismissal, discharged the jury and released the defendants.

The government asserts that the acuittal was one in form only, and thus appeal is not barred by the double jeopardy clause of the Fifth Amendment. It also contends that the district court erred in granting the motions to dismiss the indictment. We address first appellee's arguments respecting double jeopardy and thereafter consider, as our holding respecting double jeopardy requires, whether the dismissal, which we treat as one with prejudice, was proper.

II.

Double Jeopardy

The Criminal Appeals Act, 18 U.S.C. § 3731, provides, in pertinent part:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the

United State Constitution
prohibits further prosecution."[1]

Appellees contend that double jeopardy bars this appeal, arguing that jeopardy attaches when the jury is empaneled and sworn. Crist v. Bretz, 437 U.S. 28 (1978). It is true that the double jeopardy clause is concerned with avoiding multiple prosecutions even where guilt or innocence has not been estab-lsihed. United States v. Scott, 437 U.S. 82, 92 (1978). It also has been stated that perhaps the most fundamental rule in the history of double jeopardy jurisprudence is that a judgment of acquittal may not be appealed by the government without putting a defendant twice in jeopardy. United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977). This remains true even if a judgment of acquittal was entered for

erroneous reasons. Sanabria v. United States, 437 U.S. 54 (1978); Fong Foo v. United States, 369 U.S. 141 (1962).

The Supreme Court, while reviewing its earlier decisions regarding double jeopardy, recently has reiterated that a "trial judge's characterization of his own action cannot control the classification of the action." United States v. Scott, 437 U.S. 82, 96 (1978), citing United States v. Jorn, 400 U.S. 470, 478 n.7 (1971), citing United States v. Sisson, 399 U.S. 267, 290 (1970). See also United States v. Martin Linen Supply Co., 430 U.S. at 571; United States v. Wilson, 420 U.S. 332, 336 (1975). Justice Rehnquist, writing for the majority in Scott, concluded that:

> * * * "[A] defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not,

> of some or all of the factual elements of the offense charged.' Martin Linen, supra, at 571. Where the court, before the jury returns a verdict, enters a judgment of acquittal pursuant to Fed. Rule Crim. Proc. 29, appeal will be barred only when 'it is plain that the District Court . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction.' 430 U.S., at 572." 437 U.S. at 97. (Footnote omitted.)

Federal Rule of Criminal Procedure 29 provides, in pertinent part:

> "The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses."

The government asserts that, not only does the record demonstrate that the district court did not consider the sufficiency of the evidence before it, it could not have considered whether the evidence was sufficient because it ruled

in the middle of the government's case, thus failing to comply with Rule 29.

Although there is a reference in the district court's judgment to the evidence adduced by the government during the three days of trial, the record does not plainly demonstrate that the district court evaluated the government's evidence and determined that it was legally insufficient to sustain a conviction. United States v. Scott, 437 U.S. at 97. Rather, the record before us clearly demonstrates that the order was based on constitutional grounds arising from the unavailability of potential material witnesses. See United States v. Appawoo, 553 F.2d 1242 (10th Cir. 1977). The acquittal therefore was in substance an order of dismissal, and as such is appealable.[2] United States v. Scott, supra.

III.

Dismissal With Prejudice

In United States v. Mendez-Rodriguez, 450 F.2d 1 (9th Cir. 1971), this court reversed convictions for conspiracy to transport and transportation of illegal aliens because the government's deportation of eyewitnesses to the alleged offenses, without first allowing the defendant to examine those witnesses violated due process. Relying on Mendez-Rodriguez, the district court here dismissed all counts of the indictment against all defendants because two witnesses, Avila and Rivera, were unavailable to the defense before trial.

The government challenges the trial court's action primarily on three grounds. First, if Avila was unavailable to the defense before trial, that unavailability was not due to government

action. Second, because both Avila and Rivera were present at trial and could have testified, they were not "unavailable" within the holding of Mendez-Rodrigues. Finally, the government argues that, even if Rivera was "unavailable," the dismissal of those counts for which he was not a material witness was not warranted under Mendez-Rodriguez.

Avila's unavailability did not represent a violation of due process. Under Mendez-Rodriguez, due process is not violated unless a material witnesses unavailability is attributable to unilateral government action. United States v. Hernandez-Gonzales, 608 F.2d 1240, 1244 (9th Cir. 1979). Here, the government released Avila after his arrest and did not deport him or cause him to leave the jurisdiction. If defense counsel could not locate Avila before trial, that

unavailability did not result from government action with placed him "beyond the reach of the defendant[s]." United States v. Tsutagawa, 500 F.2d 420, 423 (9th Cir. 1974).

The government's second contention, that the second alien, Rivera, was not "unavailable" because he was present at trial and could have testified is unpersuasive. Although the government relies on our holding in United States v. Valdez, 594 F.2d 725 (9th Cir 1979), that reliance is misplaced. In Valdez, the defendants knew about the witness before trial, he was available to testify at trial, and it was "questionable whether the government had taken any action which placed the witness beyond the court's compulsory process jurisdiction." Id. at 728. Here, however, trial had commenced and seven witnesses

had testified before the government informed the court that Rivera was a material witness for some of the alleged offenses. The government's action in allowing Rivera to return voluntarily to Mexico in lieu of deportation prevented the defendants from interviewing Rivera before trial and may have affected the defendants' response to the government's trial presentation.

Rivera was "unavailable" within the meaning of Mendez-Rodriguez. Accordingly, the district court's dismissal of those counts of the indictment for which Rivera might have offered material testimony was proper. But the dismissal of those counts for which Rivera was not a material witness was erroneous.

This court, in interpreting and applying Mendez-Rodriguez, has consistently emphasized that unless a defen-

dant "could conceivably" benefit from a missing witness's testimony, unless he or she is prejudiced by that person's absence, there is no denial of due process warranting dismissal or reversal. See, e.g., United States v. Valdez, supra, United States v. Orozco-Rico, 589 F.2d 433, 435 (9th Cir. 1978), cert. denied, 440 U.S. 967 (1979); United States v. Lomeli-Garnica, 495 F.2d 313 (9th Cir. 1974). Particularly relevant to this case are United States v. Castellanos-Machorro, 512 F.2d 1181 (9th Cir. 1975), and United States v. Sanchez-Murillo, 608 F.2d 1314 (9th Cir. 1979).

In this case, various defendants were indicted on eight counts. Count One charged conspiracy to transport and harbor illegal aliens. Counts Three and Four alleged that individual

defendants had transported illegal aliens from Mexico to a "drop house", the Scenic Motel, near Los Angeles, or had aided and abetted that transportation. Counts Five through Eight involved transporting other illegal aliens to and from a "drop house" located on Cortado Street in El Monte, California.[3]

Rivera, the unavailable alien, visited the Cortada Street residence and may have been a material witness to the conduct alleged in Counts Five through Eight. Accordingly, those counts were properly dismissed under Mendez-Rodriguez.

There is, however, no evidence that Rivera could have offered testimony on Counts Three and Four. Although the district court, in entering judgment, found that Rivera was a witness to "incidents involving defendants and constituting a large portion of the Govern-

ment's case against the defendants", nothing in the record demonstrates any connection between Rivera and the events at the Scenic Motel. The defendants named in the third and fourth counts are, thus, in the same position as were the defendants in Castellanos-Macharro, supra, and Sanchez-Murillo, supra. They are not prejudiced by the government's deportation of a potential witness because Rivera's testimony could not conceivably benefit them.

Without some showing of a material relationship between defendants and witnesses whose unavailability is attributable to government action, the due process protections of Mendez-Rodriguez cannot be triggered. We reverse the dismissal of the third and fourth counts.

Finally, the conspiracy charge, Count One, specifies twelve overt acts that

allegedly were undertaken in furtherance of the conspiracy. Six of the twelve acts involved aliens who were concealed at the Cortada Street "drop house". Because Rivera might have offered material testimony concerning those six acts, the conspiracy defendants are potentially prejudiced by his unavailability.

Proof of an overt act is essential to demonstrating a conspiracy. Consequently, if the government were unable to show an overt act that did not involve the Cortada Street "drop house", proof of Cortada Street-related acts would be crucial, and Rivera's testimony would be material. But this potential prejudice is highly speculative: if the government were to prove any overt act not involving the Cortada Street operation, any testimony by Rivera would be immaterial.

This indefinite prejudice to the conspiracy defendants could be avoided if the trial court limited the government's proof of overt acts to those acts for which Rivera was not a material witness. Accordingly, we vacate the dismissal of Count One and remand the conspiracy charges for trial.[4]

Vacated and remanded for further proceedings.

UNITED STATES v. GONZALES, et al

No. 78-2339

FOOTNOTES

[1]In United States v. Martin Linen Supply Co., 430 U.S. 564, 567 n.4, 568, (1977), the Supreme Court concluded that "unless barred by the Double Jeopardy Clause of the Constitution, appeals by the Government from the judgments of acquittal entered by the District Court under Rule 29(c) are authorized by § 3731."

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[2]Cf. United States v. Winnie Mae Mfg. Co., No. 78-2101 (9th Cir. June 13, 1979). Appellees made a pretrial motion to dismiss the indictment for violation of constitutional rights by the deportation of illegal aliens, many of whom may

have been needed as material defense witnesses. The district court postponed the motion until a jury was sworn and a witness questioned, and then dismissed the indictment. This court rejected the contention that the appeal was barred by the double jeopardy clause, holding that when a trial is terminated on grounds unrelated to the defendant's guilt or innocence, a government appeal does not offend against the double jeopardy clause.

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[3]The only defendant named in Count Two of the indictment, which alleged transportation of an alien from the Scenic Motel, entered a guilty plea before the district's dismissal of charges against the defendant-appellees. Consequently, that count was not subject to the order of acquittal and dismissal.

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[4]The government raises two other arguments that lack merit. The record does not support the assertion that the defendants made no efforts to obtain information about Rivera. Rather, the pretrial hearing was devoted to the issue of unavailable witnesses. The government also asserts that Rivera was returned to Mexico innocently. However, the fact that repatriation was made in good faith is irrelevant. See United States v. Orozco-Rico, 589 F.2d 433 (9th Cir. 1978).

APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	NO. CR
Plaintiff,	78-304-AAH
v.	JUDGMENT OF
JOSE LUIS GONZALES; ISHVARBHAI J. PATEL; OSCAR CELSO OROSCO-MORALES; HECTOR GARCIA-MARTINEZ; SAMUEL GUDINO-BARAJAS,	ACQUITTAL AND DISMISSAL
Defendants.	

[May 11, 1978]

In this matter, the Court heard all of defendants' pretrial motions before impanelling the jury, including defendants' motion to dismiss, requiring a 3-day evidentiary hearing May 2, 3 and 4, 1978, based on the Government's alleged conduct in placing a certain

illegal alien percipient witness beyond the reach of the defendants. The Court heard numerous witnesses and the Government finally agreed that it could and would produce said illegal alien percipient witness for interview by defendants and their counsel before trial, as required by the cases cited by the defendants, U.S. v. Mendez-Rodriguez, 450 F. 2d 1 (9th Cir. 1971) and U.S. v. Tsutagawa, 500 F.2d 420 (9th Cir. 1974). Whereupon the Court denied said motion to dismiss, holding that it had become moot by reason of the Government's having made the said witness available to defendants and their counsel to determine for themselves whether the witness possessed and could testify to any exculpatory information. Additionally, the Court pointed out that the Government, by producing the witness to

defendants and their counsel had met the requirements of the aforesaid cases and strictures therein relied upon by defendants.

Then, the jury was impanelled and heard factual testimony for three days, May 5, 8 and 9, 1978. During the course of the introduction of evidence on the third day, May 9, 1978, it came to the attention of the Court and counsel that there were possible two other additional illegal alien percipient witnesses who had been made unavailable by the Immigration and Naturalization Service of the Department of Justice, to the defendants and their counsel, whether advertently or inadvertently, because of Government action and inaction.

The Court thereupon was forced to conduct another evidentiary hearing outside the presence of the jury and

found by a preponderance of clear and convincing evidence, indeed beyond any reasonable doubt, that these two illegal aliens had been and were percipient witnesses to incidents involving defendants and constituting a large portion of the Government's case against the defendants; further that these witnesses had been unavailable to the defendants and their counsel throughout the entire three days of factual trial testimony before the jury; and finally that these witnesses were made unavailable to defendants and their counsel by reason of the conduct of the Government, acting by and through agents of the Immigration and Naturalization Service.

The Court was thereby immediately and irrevocably forced to determine upon these facts forthwith a course of action

which, doing justice to both the Government and the defendants, would carry out the strictures and requirements of U.S. v. Mendez-Rodriguez, 450 F.2d 1 (9 Cir. 1971) and U.S. v. Tsutagawa, 500 F.2d 420 (9th Cir. 1974), and do so expeditiously with concomitant saving of judicial time and counsels' efforts.

Obviously, declaration of a mistrial, while avoiding double jeopardy for defendants and preserving the Government's right to appeal, would nevertheless require another trial, another presentation of the same identical evidentiary facts, including the facts of Government action and inaction having made the two illegal alien percipient witnesses unavailable to defendants and their counsel during the three days of trial before the jury. All of this would be a time wasting futility.

On the other hand, since the determination of these facts was based primarily upon evidentiary matter and not any legal issue, merely sustaining the defendants' motion to dismiss would not necessarily resolve the question.

Therefore the Court ordered, with written judgment as herein set forth to follow, that the motions for judgment of acquittal as well as the motions for judgment of dismissal would be granted.

Now, therefore, pursuant to the said findings and determination of the Court, summarized hereinabove, but set forth in detail in the reporter's notes of the proceedings of May 10, 1978, as well as the actual testimony set forth in the reporter's notes for May 5, 8 and 9, 1978,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Each and all of the defendants hereinabove named, to wit: JOSE LUIS GONZALES, ISHVARBHAI J. PATEL, OSCAR CELSO OROSCO-MORALES, HECTOR GARCIA-MARTINEZ and SAMUEL GUDINO-BARAJAS, is and are acquitted of and from each, every and all offenses alleged and set forth in the Indictment herein, and are ordered to be released forthwith, but to be held for any hold presently placed upon them, and all bonds are exonerated.

2. Said Indictment herein and each and every offense alleged and set forth therein be and the same is and are dismissed.

3. The jury herein be and is discharged from any further service herein.

4. Upon motion of the Government, the enforcement of this judgment be and is stayed until Friday, May 12, 1978, at 1:30 p.m., to enable the Government

to initiate proceedings if it so desires, in and before the Court of Appeals for the Ninth Circuit, but not ex parte, and only after appropriate notice to defendants and their counsel so that the latter can present any opposition they desire in and before the Court of Appeals.

5. The Clerk shall serve copies of this Judgment on all parties forthwith.

Dated: May 11, 1978

/s/ A. Andrew Hauk
A. ANDREW HAUK
UNITED STATES DISTRICT JUDGE

APPENDIX C

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Appellant,	)	NO. 78-2339
	)	
vs.	)	D.C. No.
	)	
JOSE LUIS GONZALES, et al,	)	CR 78-304-AAH
	)	
Appellees.	)	
	)	O R D E R

[June 27, 1980]

Before: GOODWIN and SNEED, Circuit Judges, and JAMESON,* District Judge.

On April 16, 1980, appellee Ishvarbhai J. Patel filed his petition for rehearing and suggestion for rehearing en banc.

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* The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.